No. 87-1796

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

RUTH MASSIGNA, et al.,

Petitioners,

v.

L.J., et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

SUPPLEMENTAL BRIEF OF PETITIONERS

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PETITIONERS' SUPPLEMENTAL BRIEF

This supplemental brief is submitted to bring to the Court's attention the recent decision of the Fifth Circuit in Del A., et al. v. Edwards, et al., 855 F.2d 1148 (1988), which further demonstrates the importance of the question presented to this Court in the petition.

Del A. addressed the availability of the Harlow[1] qualified immunity defense to Louisiana state officials working in or responsible for the Louisiana foster care program. The majority decision, relying heavily on the case sub judice, L.J. v. Massinga, found that the Adoption Assistance and Child Welfare Act of 1980 ("the Act")[2], particularly "the requirements calling for case plans, case review systems, proper care . . . and the maintenance of standards reasonably in accord with those of national organizations 'spell out a standard of conduct, and as corollary rights in the plaintiffs' sufficient to defeat qualified

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[1] Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) ("[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.")

[2] 42 U.S.C. §§ 620-28, 670-79.

immunity." 855 F.2d at 1154 (quoting L.J. v. Massinga, 838 F.2d 118, 123 (4th Cir. 1988)). Thus, the Fifth Circuit held that "[n]o reasonable official could have believed such inaction was lawful" and, therefore, the defendants were not entitled to qualified immunity.[3] 855 F.2d at 1154.

Del A. thus confirms the importance of the question presented here: Whether the foster care provisions of the Social Security Act, as adopted in 1961[4] and amended in 1980,[5] clearly established rights in the plaintiff foster children enforceable by suits for damages so as to deprive the defendant social workers and their superiors

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[3] The majority finds that these state officials, by failing to follow precisely the dictates of the Act, knew or should have known that they were violating statutory rights of foster children.

[4] 42 U.S.C. § 608(f) (rep aled).

[5] 42 U.S.C. §§ 620-28, 670-79.

of their qualified immunity.[6] Prior to L.J. v. Massinga and now Del A. v. Edwards, no court had ever held that these federal funding statutes so clearly established rights in foster children that the qualified immunity of social workers and others implementing the federal grant program is defeated.[7] These holdings are particularly

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[6] The Fourth Circuit decided both that qualified immunity is unavailable to these defendants (because the statutory rights of plaintiffs were clearly established) and that these foster children have a cause of action for damages against these defendants. L.J. v. Massinga, 838 F.2d 118, 123 (4th Cir. 1988). The question presented here fairly includes the issue of whether plaintiffs have a cause of action for damages under this federal grant program. See Sup. Ct. R. 21.1(a). If they do not, these rights are not clearly established and do not defeat these defendants' qualified immunity. See Davis v. Scherer, 468 U.S. 183, 194 n.12 (1984); Drake v. Scott, 812 F.2d 395, 399 (8th Cir.), modified on other grounds, 823 F.2d 239 (8th Cir.), cert. denied, 108 S. Ct. 455 (1987); see also, Del A. v. Edwards, 855 F.2d 1148, 1155 (5th Cir. 1988) (Smith, J. dissenting).

[7] See Petitioner's Brief at 11-12.

astounding given the vagueness of the statutes and that the statutory mandate is directed to the States, not to social workers, to establish certain guidelines and criteria for operating the foster care program.[8]

The significant impact of these opinions is demonstrated by the Del A. dissent, which points out that the majority would hold the Governor of Louisiana and other state officials personally liable for damages to foster children, if a federal grant provision

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[8] Even if one were to interpret 42 U.S.C. § 608(f) (repealed), for example, as establishing a right to a "plan . . . to assure that [a foster child] receives proper care", it simply does not follow that a social worker would know that by placing plaintiff P.G., for example, in an allegedly unsuitable home was "objectively legally unreasonable" or that the social worker would "understand that what he is doing violates that right." Anderson v. Creighton, ____ U.S. ____, 107 S. Ct. 3034, 3039 (1987).

deadline was missed, because "the defendants would have violated a clearly-established right cognizable under section 1983. . . ." 855 F.2d at 1154 (Smith, J., dissenting). The dissent correctly rejects this view: "state officials do not owe harmed individuals, from their own pockets, where the state violates a federal funding statute." 855 F.2d at 1157 (Smith, J., dissenting) (citing Rosado v. Wyman, 397 U.S. 397, 420 (1970); Pennhurst State School and Hosp. v. Halderman, 451 U.S. 1 (1981); Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 596 (1983)).

The question presented demands resolution by this Court, for to hold social workers personally liable for actions taken over decades of public service on the basis that vague, general federal grant statutes clearly established rights in foster children is patently unfair, puts social workers and

state officials in an untenable situation, and is against the public interest.[9] The Del A. dissent captures well the problem:

> "[T]he majority has placed an intolerable burden upon public officials who, wishing to take advantage of federal assistance, are faced with a more-than-imaginary conflict of interest: they must decide between substantial financial assistance for a deserving and disadvantaged class of their own citizens, on the one hand, and reasonably insuring themselves against personal financial disaster, on the other. Congress could not have intended so unpalatable and counter-productive a scheme, and our system of federalism would appear to forbid it."

855 F.2d at 1160 (Smith, J., dissenting).

CONCLUSION

The Court should grant the petition and review the judgment of the Fourth Circuit for the reasons set forth in the petition and in

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[9] See Motion for Leave to File Brief as Amicus Curiae of National Association of Social Workers, pp. 5-9.

petitioners' subsequent briefs and those of the amici.

Respectfully submitted,

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